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Supreme Court, U.S.
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No. 95-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE STATE OF OKLAHOMA,
Petitioner,

v.

JOSE FLORES FLORES,
Respondent.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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September, 1995
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QUESTIONS PRESENTED

1. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the defendant was "presumed to be not guilty" so impermissibly lessened the burden of proof upon the state that it denied the defendant his constitutional right to a fair trial as articulated in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

2. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the defendant was "presumed to be not guilty" is an error constituting a substantial violation of constitutional right that may never be considered harmless.

3. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the state had the burden of proving all the material allegations of the information beyond a reasonable doubt before the jury could find the defendant guilty violated the Due Process Clause pursuant to *Sullivan v. Louisiana*, 508 U.S. ____, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

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No. _____,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

v.

JOSE FLORES FLORES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Oklahoma, by and through W.A. Drew Edmondson, Attorney General of the State of Oklahoma, respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Court of Criminal Appeals for the State of Oklahoma.

OPINION BELOW

The published opinion of the Court of Criminal Appeals for the State of Oklahoma is recorded at *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995). The opinion was rendered January 24, 1995. A petition for rehearing was filed. The order denying rehearing was rendered June 27,

1995, and is recorded at *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995). This petition for writ of certiorari is due to be filed on September 25, 1995.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATEMENT OF CASE

The defendant, Jose Flores Flores, was convicted of the crime of Murder in the First Degree in Tulsa County, Oklahoma, in Case No. CF-92-4472, and received a sentence of life imprisonment without parole.

The defendant raised seven propositions of error on appeal, two of which were addressed by the Oklahoma Court of Criminal Appeals in reversing his conviction. *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995). The two grounds related to the instructions of the trial court that the defendant was presumed to be not guilty and that the prosecution had the burden to prove the material allegations of the information beyond a reasonable doubt before the jury could convict the defendant.

The State filed a petition for rehearing urging that if the instruction on the presumption of being not guilty was error, it was only a violation of state law and subject to harmless error analysis; and further, that the decision should be given prospective effect only. The Court of Criminal

Appeals denied the petition for rehearing. *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995).

SUMMARY OF THE ARGUMENT

The Oklahoma Court of Criminal Appeals has misapplied *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), and *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978), so as to find that an instruction advising the jury that the defendant is presumed to be not guilty is a misstatement of law diluting the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. The Court of Criminal Appeals has also erred in finding that the instruction is an error of such magnitude that it can never be held to be harmless.

Furthermore, the Court of Criminal Appeals has misapplied this Court's opinion in *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), in concluding that an instruction advising the jury that the prosecution had the burden of proving the material allegations of the information--rather than the elements of the offense--beyond a reasonable doubt was a violation of the Due Process Clause.

REASONS FOR GRANTING WRIT

I.

THE OKLAHOMA COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THAT THE DEFENDANT WAS "PRESUMED TO BE NOT GUILTY" SO IMPERMISSIBLY LESSENED THE BURDEN OF PROOF UPON THE STATE THAT IT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AS ARTICULATED IN *ESTELLE V. WILLIAMS*, 425 U.S. 501, 96 S. CT. 1691, 48 L. ED. 2D 126 (1976).

At the defendant's trial, the trial court gave an instruction stating that the defendant was presumed to be not guilty of the crime charged against him in the information until his guilt was established beyond a reasonable doubt; the instruction also stated that the presumption continued with him unless every material allegation of the information was proven by evidence beyond a reasonable doubt. The defendant did not object to this instruction.

This instruction deviated from the Oklahoma Uniform Jury Instructions--Oklahoma, which is prescribed by Okla. Stat. tit. 12, § 557.2 (1991). However, a violation of § 557.2 is not automatically reversible under Oklahoma state law. *Fontenot v. State*, 881 P. 2d 69, 84 (Okla. Crim. App.

1994). Whether the error in the instruction required reversal required the Court of Criminal Appeals to determine whether the error violated a substantial constitutional or statutory right. Okla. Stat. tit. 20, § 3001.1 (1991). If the error in an instruction violated a constitutional right, the court may still consider whether it is harmless under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Although the Court of Criminal Appeals recognized that an instruction on the presumption of innocence is not constitutionally required in all cases but was required by state statute, Okla. Stat. tit. 22, § 836 (1991), the court relied on federal constitutional law to demonstrate that the instruction on the presumption to be not guilty required reversal to prevent a "dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Flores*, 896 P. 2d at 562, citing *Estelle v. Williams*, 425 U.S. at 503, 96 S. Ct. at 1692-93.

The Court of Criminal Appeals has misinterpreted this Court's statement of purpose of the presumption of innocence. The court stated that the presumption was a command to the jury "to start their deliberations from the premise there exists an absence of guilt." *Flores*, 896 P. 2d at 562. The court distinguished the presumption of being not guilty as a different command to the jury: to begin its deliberations from the premise there is an absence of sufficient proof of guilt. *Id.* However, this Court has identified the presumption of innocence instruction as a prophylactic for ensuring that the accused is judged solely on the basis of the evidence adduced at trial. *Taylor v. Kentucky*

436 U.S. 478, 486, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). The advantage of an instruction on the presumption of innocence--beyond just a restatement that the burden is on the prosecution to prove its case beyond a reasonable doubt--is that it:

> conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider in the material for their belief, *nothing but the evidence, i.e.,* no surmises based on the present situation of the accused.

Taylor, 436 U.S. at 485, quoting 9 J. Wigmore, Evidence § 2511, p. 407 (3d ed 1940) [Emphasis in original].

An instruction that the accused is presumed innocent and one that he is presumed not guilty are indistinguishable in the function of emphasizing to the jury that the burden is upon the state to prove the elements of the charge beyond a reasonable doubt. Clearly, use of "presumed innocent" as a talismanic phrase is not necessary to fulfill the constitutional functions of the instruction. In *Taylor*, this Court quoted with approval from Professor Wigmore:

> It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charged is presumed to be not guilty is to say in another form that the proponent of the claim or charge must evidence it. Wigmore 407.

436 U.S. at 483, n. 12. Perhaps Professor Wigmore's use of both phrases interchangeably led this Court to emphasize that

the phrase "'presumption of innocence'-- or any other form of words" may not be constitutionally mandated so long as the principle that guilt be established by probative evidence and beyond a reasonable doubt is not diluted. 436 U.S. at 485-86.

Other instructions given by the trial court stated that the burden was on the state to prove by evidence all the material allegations in the information and that the failure of the state to meet its burden required the jury to acquit (O.R. 44); in addition, the court instructed that the state had the burden of proving each element of the offense of murder in the first degree beyond a reasonable doubt (O.R. 45). When taken as a whole, the jury could only have concluded that the burden was on the state to prove by evidence each element of the offense beyond a reasonable doubt.

The instruction on the presumption of being not guilty satisfied *Taylor*, as modified by *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), a conclusion shared by the Ohio Court of Appeals in *City of Bucyrus v. Fawley*, 50 Ohio App. 3d 25, 552 N.E.2d 676, 677 (Ohio App. 1988).

The Court of Criminal Appeals found that use of an instruction that the defendant was presumed not guilty so undermined the presumption of innocence as to effectively deny the defendant's constitutional and statutory rights; the rights identified by the court were his constitutional right to have his guilt established by probative evidence and beyond a reasonable doubt. The instruction on a presumption of being not guilty did not dilute this right and this Court should grant certiorari to correct the error in the manner the Court of Criminal Appeals interpreted *Estelle v. Williams*, and *Taylor*.

II.

THE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THE DEFENDANT WAS "PRESUMED TO BE NOT GUILTY" IS AN ERROR CONSTITUTING A SUBSTANTIAL CONSTITUTIONAL RIGHT THAT MAY NEVER BE HARMLESS.

The Court of Criminal Appeals identified the defendant's right to an instruction on the presumption of innocence as statutory but then identified the interests serviced by the instruction by reference exclusively to United States constitutional law. The court found the instruction that the defendant was presumed not guilty amounted "to an **impermissible** lessening of the burden of proof." *Flores v. State*, 896 P.2d 558, 562 (Okla. Crim. App. 1995). While the opinion's next sentence suggests that the error might upon occasion be considered harmless in light of the instructions when taken as a whole ("Such error was not cured by any other instructions specifically, an appropriate burden of proof instruction." *Id.*), it is clear that the court concluded that the error in use of an instruction of the presumption of being not guilty is not subject to harmless error analysis on a case-by-case basis under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

This conclusion is supported by the opinions concurring in and dissenting to the Order Denying Rehearing, *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995). Judge Chappell concluded that the instructional error cannot be dismissed as harmless lest it "undermine two

crucial tenets of our democratic society: that a criminal conviction must be support by trial evidence which establishes guilt beyond a reasonable doubt; and that out government is one of laws and not of men." *Id.* at 1167. Judge Strubhar wrote that she "agonized over the decision to find such an error may never be harmless." *Id.* at 1168. The dissenting opinion of Presiding Judge Johnson confessed that he had misinterpreted the language in *Flores* relative to harmless error analysis; he would have found the error of a presumed not guilty instruction subject to harmless error analysis but that it was not harmless in Flores' case. *Id.* at 1169-70. Finally, Judge Lumpkin's dissent discusses extensively the harmless-error doctrine in reference to presumed not guilty instructions. *Id.* at 1170-1177.

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), this Court stated that most constitutional errors can be harmless and supplied a list of examples. Many of these errors identified as subject to harmless error analysis on a case-by-case basis arguably involved a lessening of the burden upon the prosecution: *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504, 107 S. Ct. 1918, 95 L.Ed. 2d 439 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption). These were identified as "trial errors" in contrast to "structural errors" which can never be subject to harmless error analysis. *Fulminante*, 499 U.S. at 307-09.

The error in a presumed not guilty instruction identified by the Court of Criminal Appeals is that it

undermined the presumption of innocence as to effectively deny the constitutional and statutory protections the presumption affords, i.e., that jurors "put away from their mines all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." *Flores*, 896 P.2d at 562, quoting *Taylor v. Kentucky*, 436 U.S. at 485. If this is error, it is a trial error and subject to harmless error analysis.

As Chief Justice Rehnquist stated in his concurring opinion in *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), "there is a 'strong presumption' that any error will fall into the first of these categories. Thus it is the rare case in which a constitutional violation will not be subject to harmless error analysis." *Id.* 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d at 191.

The Court of Criminal Appeals has essentially found that the instruction on the presumption of not guilty violated the defendant's right to a fair trial and his right that guilt be established by probative evidence beyond a reasonable doubt as articulated in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). These violations are trial error and not structural error. The decision that this instructional error can never be harmless conflicts with clear statements of the law by this Court. Certiorari should be granted to correct this error and to allow the Court of Criminal Appeals to apply the harmless error standard to the presumed not guilty instruction.

III.

THE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THAT THE STATE HAD THE BURDEN OF PROVING ALL THE MATERIAL ALLEGATIONS OF THE INFORMATION BEYOND A REASONABLE DOUBT BEFORE THE JURY COULD FIND THE DEFENDANT GUILTY VIOLATED THE DUE PROCESS CLAUSE PURSUANT TO *SULLIVAN V. LOUISIANA*, 508 U.S. ___, 113 S. CT. 2078, 124 L. ED. 2D 182 (1993).

The Court of Criminal Appeals stated it was less troubled by the trial court's instruction that the state had the burden of proving the material allegations of the information than by the instruction that the defendant was presumed not guilty. However, just as the court elevated "presumed innocent" to a talisman, the court has essentially mandated the use of the phrase "elements of the offense." Therefore, despite another instruction defining the elements of the offense and proscribing a conviction in the event the state failed to prove each element by proof beyond a reasonable doubt (O.R. 45), the court found the "material allegations" instruction violated due process according to *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 2080, 124 L. Ed. 2d 182 (1993).

All the essential elements of an offense are to be alleged in an information. *Miller v. State*, 827 P.2d 875, 877 (Okla. Crim. App. 1992). The defendant in this case has not

challenged the information for failing to allege the essential elements of murder in the first degree. The use of the phrase "material allegations of the information" in this case did not negate the elements of the offense; if anything, the instruction increased the burden of proof upon state. The instructions as a whole clearly stated the burden was upon the state to prove each element of the offense beyond a reasonable doubt.

The Court of Criminal Appeals erred in holding in effect that *Sullivan v. Louisiana*, supra, mandated use of the phrase "elements of the offense." The issue in that case was whether a constitutionally deficient definition of reasonable doubt is subject to harmless error analysis. In the instant case, however, there was no definition--deficient or otherwise--of reasonable doubt at issue. However, where as here, the instructions when taken as a whole clearly place the burden of proof upon the state to prove all the elements of the offense charged beyond a reasonable doubt before the jury may find the defendant guilty, then use of the phrase "material allegations" did not violate due process.

This Court should grant certiorari to review and correct the erroneous conclusion of the Court of Criminal Appeals that use of the phrase "material allegations" violated due process.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeal. The decision is contrary to the law of this Court.

Respectfully submitted,

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APPENDIX

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EXHIBIT "A" - Opinion

EXHIBIT "B" - Order Denying Rehearing

EXHIBIT "A"

Jose Flores FLORES, Appellant,

v.

STATE of Oklahoma, Appellee.

No. F-93-977.

Court of Criminal Appeals of Oklahoma.

Jan. 24, 1995.

Rehearing Denied June 27, 1995.

Defendant was convicted of murder in the first degree, in the District Court, Tulsa County, Clifford E. Hopper, J. Defendant appealed. The Court of Criminal Appeals, Strubhar, J., held that: (1) reversal was required, as a result of trial court's departure from standard instruction on presumption of innocence, by informing jury that there was presumption defendant was not guilty, and (2) trial court should not have departed from standard instruction, that state was required to prove "each element of the crime beyond a reasonable doubt," by instructing that state was required to prove beyond reasonable doubt "all the material allegations contained in th Information."

Reversed and remanded.

Lumpkin, J., concurred in result and filed opinion.

When jury must be instructed on certain subject, relevant uniform instruction shall be used unless trial court determines that it does not accurately state law.

Deviation from uniform instruction does not automatically result in reversal; Court of Criminal Appeals will review instruction given to determine whether it fairly and accurately states applicable law.

Even when instruction error is committed reversal is not required, unless such error results in miscarriage of justice or constitutes substantial violation of constitutional or statutory right.

Principle that there is presumption of innocence in favor of accused is undoubted law, axiomatic and elementary, and its enforcement lies at foundation of criminal law.

Statute requires that trial court instruct jury on presumption of innocence in every criminal case. 22 Okl.St.Ann. § 836.

When trial court embarks to instruct jury on point of law, it cannot be doubted that instruction must be accurate.

Reversal was required when trial court departed from standard jury instruction on presumption of innocence, to instruct that defendant was to be presumed "not guilty" of crime; "presumption of innocence" commands jury to start their deliberations from premise that there is an absence of guilt, while "presumption of not guilty" conveys existence of absence of sufficient proof of guilt, distinction resulting in impermissible lessening of burden of proof by expanding degree of doubt that is permissible. 12 Okl.St.Ann. § 577.2.

See publication Words and Phrases for other judicial constructions and definitions.

Trial court should not have departed from standard jury instruction on burden of proof, which required that state

prove each element of crime beyond reasonable doubt, by instructing that burden was on state to establish beyond reasonable doubt "all the material allegations contained in the Information"; trial court's instruction had potential of being confusing. 12 Okl.St.Ann. § 577.2.

An appeal from the District Court of Tulsa County.

Jose Flores, appellant, was tried by jury for the crime of Murder in the first degree, in Case No. CRF-92-4472 in the District Court of Tulsa County before the Honorable Clifford E. Hopper, District Judge. The jury found appellant guilty of first degree murder in violation of 21 O.S. 1991, § 701.7(A) and recommended punishment of life without parole. The trial court sentenced appellant accordingly. From this Judgment and Sentence, appellant appeals. The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for new trial.

Ron Wallace, Tulsa, for appellant at trial and Paula J. Alfred, Tulsa County Public Defenders Office, Tulsa, on appeal, for appellant.

Sarah Smith, Tulsa, for the State at trial, and Susan Brimer Loving, Atty. Gen. of Oklahoma and Diane L. Slayton, Asst. Atty. Gen., Oklahoma City, for the State on appeal.

OPINION

STRUBHAR, Judge:

Appellant, Jose Flores Flores, appellant, was tried by jury and convicted of Murder in the first degree in violation of 21 O.S.1991, § 701.7(A), in Case No. CF-92-4472 in the District Court of Tulsa County, the Honorable Clifford E. Hopper, District Judge presiding. The jury recommended punishment of life without parole and the trial court sentenced Appellant accordingly. From this judgment and sentence Appellant perfected his appeal to this Court.

Appellant raised seven propositions of error. Because we find the trial court erroneously instructed the jury resulting in a denial of Appellant's constitutional and statutory rights, a new trial must be conducted. Insomuch as this case must be REVERSED and REMANDED for a new trial, we deem a recitation of the facts unnecessary.

A. PRESUMPTION OF INNOCENCE

Appellant argues in his fourth proposition of error that the trial court committed reversible error in administering a modified version of Oklahoma Uniform Jury

Instruction-Criminal No. 903 (hereinafter OUJI-CR).[1] The instruction administered read as follows:

> You are instructed that the defendant is presumed to be not guilty of the crime charged against him in the Information unless his guilt is established by evidence beyond a reasonable doubt and that presumption of being not guilty continues with the defendant unless every material allegation of the Information is proven by evidence beyond a reasonable doubt. See Instruction No. 2 (O.R. at 44).

Appellant complains the trial court's instruction not only deviates from OUJI-CR-903, but also violates 12 O.S.1991, § 577.2,[2] dilutes the presumption of innocence and diminishes the State's burden of proving him guilty beyond a reasonable doubt. He argues the instruction also fails to

[1]OUJI-CR-903 provides:

> The defendant(s) [is] [are] presumed innocent of the crime(s), and the presumption continues unless after consideration of all the evidence you are convinced of [his] [her] guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt. The defendant(s) must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime(s).

[2]12 O.S.1991, § 577.2 provides in pertinent part:

> Whenever Oklahoma Uniform Jury Instruction (OUJI) contains an instruction applicable in a civil or a criminal case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law.

advise the jury that the presumption of innocence remains until the jury is convinced of guilt. The State contends because Appellant failed to object or submit any written instructions, any error in the instruction is waived. Rowell v. State, 699 P.2d 651, 653 (Okl.Cr.1985). The State further maintains no error occurred because the instructions as a whole fairly and accurately state the applicable law. *Davis v. State*, 763 P.2d 109, 111 (Okl.Cr.1988), cert. denied, 489 U.S. 1055, 109 S.Ct. 1319, 103 L.Ed.2d 588 (1989). Because Appellant failed to object and submit alternative instructions, our review is limited to plain error. Simpson v. State, 876 P.2d 690, 693 (Okl.Cr.1994); 12 O.S.1991, Sec. 2104.

[1-3] In *Fontenot v. State*, 881 P.2d 69, 84 (Okl.Cr.1994), we reiterated our rule that when a jury must be instructed on a certain subject, the relevant uniform instruction "shall be used unless the [trial] court determines that it does not accurately state the law." See also, *Perez v. State*, 798 P.2d 639, 641 (Okl.Cr.1990). However, deviation from the uniform instructions does not require automatic reversal. *Fontenot*, 881 P.2d at 84. We review the instructions to determine whether the instruction at issue fairly and accurately states the applicable law. Id. Even when error is committed, reversal is not required unless such error results in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. *Fontenot*, 881 P.2d at 85, *quoting Brown v. State*, 777 P.2d 1355, 1358 (Okl.Cr.1989), *citing* 20 O.S.1991, § 3001.1.

Because OUJI-CR-903 correctly sets forth the presumption of innocence and 12 O.S.1991, § 577.2 requires trial courts to administer the uniform instructions, we find it was error to deviate from OUJI-CR-903. We must now determine whether the error is harmless beyond a reasonable doubt or goes to the foundation of the case constituting a substantial violation of a constitutional or statutory right. *Fontenot*, 881

P.2d at 85; *Simpson*, 876 P.2d at 693; 20 O.S.1991, Sec. 3001.1; *Chapman v. California*, 386 U.S. 18, 21-22, 87 S.Ct. 824, 826-27, 17 L.Ed.2d 705 (1967).

The presumption of innocence until proven guilty is a right guaranteed by statute. *Miller v. State*, 3 Okl.Cr. 374, 106 P. 538 (1910); 22 O.S.1991, § 836.[3] "It is a positive legal right appertaining to every accused person, whether guilty or innocent, that he shall not be condemned for a criminal offense in a judicial trial until and unless the evidence produced against him shall be legally sufficient to prove his guilt beyond a reasonable doubt." *Miller*, 106 P. at 539. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). Courts must be ever mindful of factors that may undermine the fairness of the trial process. *Id.* Further, courts must be vigilant to avoid the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *Id.*

[4] "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895)[4]. This principle is

[3]Title 22 O.S.1991, § 835 provides:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

[4]The *Coffin* court held the presumption of innocent and the equally fundamental principle that the prosecution bears the burden of proof beyond a reasonable doubt were logically separate and distinct. *Coffin*, 156 U.S. at 458-61, 15 S.Ct. at 404-06. This conclusion was the subject

so ingrained in our jurisprudence it caused Judge Furman to write, "it is said that the presumption of innocence has been classed as one of the two 'great cardinal maxims, which may be said to be written on the portals of every criminal court, and to hang over an accused like an aegis of protection from the moment he is placed at its bar for trial'." *Miller*, 106 P. at 539, quoting *Hampton v. State*, 1 Tex.Crime. 652, 659-60 (1877). Judge Furman further summed up the importance of the presumption of innocence quoting Justice Burwell in *Horn v. Territory*, 8 Okl. 52, 56 P. 846, 848 (1899)[5]:

> A defendant's friends may forsake him, but the presumption of innocence, never. It is present throughout the entire trial; and, when the jury go to their room to deliberate, the "presumption of innocence" goes in with them, protesting against the defendant's guilt. And it is only after the jury has given all the

of sharp criticism. J. Thayer, A Preliminary Treatise on Evidence 551-576 (1898); 9 J. Wigmore, Evidence § 211 (3d ed 1940); C. McCormick, Evidence 805-806 (2d ed 1972). In *Agnew v. Unites States*, 165 U.S. 36, 51-52, 17 S.Ct. 235, 241-42, 41 L.Ed. 624 (1897), the Court retreated from its conclusion that the presumption of innocence is evidence to be weighted by the jury. *See, Taylor v. Kentucky*, 436 U.S. 478, 483 n. 12, 98 S.Ct. 1930, 1934 n, 12, 56 L.Ed.2d 468 (1978). with them, protesting against the defendant's guilt. And it is only after the jury has given all the evidence in the case a full, fair, and impartial consideration, and have been able to find beyond a reasonable doubt that the defendant is guilty as charged, that the presumption of innocence leaves him.

[5]In citing *Horn*, we are aware that this Court has rejected the *Horn* principle that the presumption of innocence constitutes evidence to be weighed by the jury. *See, Culpepper v. State*, 4 Okl.Cr. 103, 111 P. 670, 686 (1910).

> evidence in the case a full, fair, and impartial consideration, and have been able to find beyond a reasonable doubt that the defendant is guilty as charged, that the presumption of innocence leaves him.

Miller, 106 P. at 539.

[5] Early on this Court addressed the propriety of an instruction on the presumption of innocence. *Jenkins v. State*, 11 Okl.Cr. 168, 145 P. 500 (1914). We held an instruction on the presumption of innocence "should always be given."[6] *Id.* at 501. The presumption of innocence is "merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases." *Culpepper v. State*, 4 Okl.Cr. 103, 111 P. 679, 680-81 (1910). The presumption of innocence fixes the burden of proof and designates that the duty rests upon the State to produce evidence and to effect persuasion beyond a reasonable doubt before the jury is authorized to convict. *Cochran v. State*, 4 Okl.Cr. 393, 114 P. 747, 748 (1910). We continue to adhere to the wisdom of our founding jurists and believe that 22 O.S.1991, Sec. 836 requires trial courts to instruct the jury on the presumption of innocence in every criminal case.

[6] The actual impact of the instruction in the instant case on the judgment of the jurors is difficult to determine. We are cognizant that an instruction on the presumption of innocence is not constitutionally required in every case and

[6]The *Jenkins* court held it would not reverse a conviction for failure to instruct on the presumption of innocence when the jury was fully instructed on the burden of proof, the failure to instruct was an oversight, counsel failed to object and no injury resulted to the accused. *Jenkins*, 145 P. at 501.

each case must be considered on its particular facts. *Kentucky v. Whorton*, 441 U.S. 786, 789, 99 S.Ct. 2088, 2089-90, 60 L.Ed.2d 640, 643 (1979); *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468, 475 (1978); *Jenkins*, 145 P. at 501. However, when the trial court embarks to instruct the jury on a point of law, it cannot be doubted that the instruction must be accurate.[7] *Mahorney v. Wallman*, 917 F.2d 469, 473 (10th Cir.1990). As the *Mahorney* court noted in reviewing improper statements made by a prosecutor concerning the presumption of innocence, "[a] misstatement of law that affirmatively negates a constitutional right or principle is often ... a more serious infringement than the mere omission of a requested instruction." *Mahorney*, 917 F.2d at 473.

[7] In the instant case the jury was instructed that Appellant was presumed to be not guilty rather than presumed innocent. The instruction obfuscates the presumption of innocence. "[T]he presumption of innocence 'cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced'." *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468 (1978), quoting, 9 J. Wigmore, Evidence Sec. 2511, p. 407 (3d ed 1940); *Miller*, 106 P. at 539. The presumption of innocence commands the jury to start their deliberations

[7]Our research has uncovered only one other jurisdiction administering an instruction on the presumption of "not guilty". In *City of Bucyrus v. Fawley*, 50 Ohio App.3d 25, 552 N.E.2d 676 (1988), the court held, after evaluation the instruction in light of the totality of the circumstances, the "instruction was sufficient to satisfy *Taylor v. Kentucky*, supra, as limited by *Kentucky v. Whorton*, supra." The Ohio court's reliance on *Taylor* and *Whorton* is misplaced insofar as those cases address the issue of failure to give a presumption of innocence instruction rather than an erroneous instruction.

from the premise there exists an absence of guilt while the presumption of not guilty conveys there exists an absence of sufficient proof of guilt. While the distinction is subtle, we find it amounts to an impermissible lessening of the burden of proof by expanding the degree of doubt that is permissible. Such error was not cured by any other instructions specifically, an appropriate burden of proof instruction. *See*, Part B, infra. Instruction No. 2 conveys to the minds of the jury an erroneous impression, in that it may be construed as varying the rule of law. Further, it imparts a qualification of the meaning, scope, manifest design and operation of the legal presumption of innocence.

The term presumed innocent has a self-evident meaning comprehensible to the lay juror. The meaning is hardly susceptible to improvement by judicial efforts. Instead of improvement, the most likely outcome of alterations of OUJI-CR-903 is unnecessary confusion and a constitutionally impermissible lessening of the required standard of proof. To protect the accused's constitutional and statutory rights and avoid supplying the grounds for otherwise unnecessary challenges, the wisest course for trial courts to take is to avoid altering OUJI-CR-903. As we stated in *Johnson v. State*, 841 P.2d 595, 596 (Okl.Cr.1992), "[w]ords do have specific meaning and must be used properly, especially with 'Jury Instructions'." This Court abhors a retrial due to instruction errors which can be easily avoided. However, in the administration of criminal justice, it is our duty to carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. at 503, 96 S.Ct. at 1692-93. Accordingly, we find the presumption was so undermined by the instruction given that the constitutional and statutory protection ordinarily afforded thereunder was effectively denied.

B. BURDEN OF PROOF

[8] Appellant argues in his third proposition of error that the trial court committed reversible error in administering a modified version of OUJI-CR-109. The instruction administered read as follows:

> You are instructed that the burden of proof in this case is upon the State to establish by evidence, beyond a reasonable doubt, all the material allegations contained in the Information and unless the State has met it's (sic) duty in this respect, you cannot find the defendant guilty, but must acquit him. *See*, Instruction No. 1 (O.R. at 44).

Appellant again complains the trial court's instruction impermissibly deviates from the uniform instruction,[8] violates 12 O.S.1991, § 577.2 and due process of law.

The jury in the instant case was instructed that the State must prove "all the material allegations contained in the Information" beyond a reasonable doubt rather than the State must prove specific elements beyond a reasonable doubt. In *Sullivan v. Louisiana*, --- U.S. ----, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993), the Supreme Court stated, "[w]hat the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause." It is the prosecution's burden to prove all elements of the offense charged, see, e.g., *Sullivan*, --- U.S. at ----, 113 S.Ct. at

[8]OUJI-CR 109 provides:

> The defendant(s) [has][have] pled not guilty. A plea of not guilty puts in issue each element of the crime with which the defendant(s) [is] [are] charged. A plea of not guilty requires the State to prove each element of the crime beyond a reasonable doubt.

2080; *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977); *Leland v. Oregon*, 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 96 L.Ed. 1302 (1952), and to persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, e.g., *Sullivan*, --- U.S. at ----, 113 S.Ct. at 2080; In re *Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); *Cool v. United States*, 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972) (per curiam).

Although this instruction is not as troubling as the presumption of innocence instruction administered in this case, it may be confusing. Therefore, we again hold the uniform instructions be utilized by the district courts to avoid confusion and error.

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a new trial.

JOHNSON, P.J., and CHAPEL, V.P.J., and LANE, J., concur.

LUMPKIN, J., concur in result.

LUMPKIN, Judge, concurring in result.

While I agree the case must be reversed, I write to correct one point in the Court's reasoning, and to specifically delineate the factors used in determining reversal is necessary.

The error in the Court's analysis lies in its review to determine whether "the error is harmless beyond a reasonable doubt." Slip op. at 4. This is incorrect. Although there is no doubt the presumption of innocence is deeply ingrained in our system of justice, we need not resort to vague pronouncements in our jurisprudence to find its

origin; it is reflected in 22 O.S.1991, § 836,[1] and has been since before statehood. As the Court correctly states, the presumption of innocence is "not articulated in the Constitution" and the decision in this case is based on a violation of a "right guaranteed by statute, [22 O.S.1991, § 836]".

Consequently, the correct standard of review is not whether the error is harmless beyond a reasonable doubt, but whether we have "grave doubts" the error in instructing the jury did not have a "substantial influence" on the outcome of the trial. *Simpson v. State*, 876 P.2d 690, 702 (Okl.Cr.1994).

The Court's opinion also does not specifically state how it arrived at its decision that reversal was warranted. I would use the factors enunciated by the United States Supreme Court in *Kentucky v. Whorton*, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 786 (1979). There, the Court said the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution; rather,

> "such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial."

Id. 441 U.S. at 789, 99 S.Ct. at 2090. This is the standard this Court used in the past. See *Hyatt v. State*, 779

[1]That provide reads: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted."

P.2d 993, 995 (Okl.Cr.1989) (used factors to determine failure to give instruction on presumption of innocence was harmless error). Absent abandonment of that standard for review, we are bound to it by stare decisis.

Here, as the opinion notes, the error in instruction was not cured by an appropriate burden of proof instruction; hence, I consider it decisive that in light of all the instructions given, the erroneous instruction given did in fact constitute an impermissible lessening of the burden of proof "by expanding the degree of doubt that is permissible." Op. at 562.

In light of the instructions given, some inappropriate comments by the prosecutor, the sufficient but not overwhelming evidence of guilt and the particular circumstances of this case, I agree reversal is warranted, I am not certain "the error did not influence the jury, or had a very slight effect" on the verdict. *Simpson*, 876 P.2d at 702. It is because of these "grave doubts," *Id.*, that I concur in result.

EXHIBIT "B"

JOSE FLORES FLORES, Appellant,

v.

STATE OF OKLAHOMA, Appellee.

FLORES v. STATE

No. F-93-977

COURT OF CRIMINAL APPEALS OF OKLAHOMA

ORDER DENYING REHEARING

On February 13, 1995, the appellee, State of Oklahoma, filed a Petition for Rehearing in the above styled case after the appellant's conviction was reversed and remanded for new trial by this Court on January 24, 1995. A petition for rehearing may only be filed if 1) some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or 2) the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument. Rule 3.14(B), *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.1994, Ch. 18, App. As the complaints raised in the Petition for Rehearing do not fall within the above criteria, rehearing is not warranted in this case.

IT IS THEREFORE THE ORDER OF THIS COURT that this Petition for Rehearing is DENIED.

Chapel, V.P.J., Specially Concurring:

When the State seeks to convict one of its citizens of a crime and deprive that citizen of his or her life or liberty, the State should, at the very least, be required to follow the law. Quite appropriately, this Court applies the "harmless error" doctrine to errors which neither result in a miscarriage of justice nor constitute a substantial violation of a constitutional or statutory right. Thus, our law does not require perfection by the State in prosecuting a citizen. We can, and do, frequently deem harmless those errors which do not substantially violate an individual's rights.

In our opinion issued in this case, *Flores v. State*,[1] we were in unanimous agreement (i) that the trial court erred in giving its infamous "presumed not guilty" instruction, and (ii) that the error was not harmless. The Court now finds itself mired in disagreement over the application of the harmless error doctrine to the error in this case. I find Flores to be clear. The error was analyzed, the harmless error doctrine was applied, and the Court unanimously concluded the error was not harmless. A majority of the Court stands by that analysis and conclusion.

A minority, however, has concluded that in some cases, if proof of guilt is sufficiently strong and there are no additional errors, this instructional error can be deemed harmless. I find this kind of analysis alarming. By following it, one can conclude that any error is harmless if the defendant is really guilty and the proof is overwhelming. The degree of proof of guilt can and should be a consideration in the applicability of the harmless error analysis. But it should not be the determinative factor, and I fear that is where the minority would lead us. Simply because the defendant is guilty does not mean the State does

[1] _____ P.2d _____, 66 OBJ 367 (Okl.Cr.1995).

not have to follow the law.

Our system of criminal justice is presently being tested as it never has before. Modern video recording technology and scientific forensic methods,
properly performed, appear to eliminate doubt as to guilt in many cases. The application of discovery principles to criminal proceedings and wholesale changes in ethical rules applicable to the legal profession have resulted in confusion as to the role lawyers play in what has heretofore been an "adversarial system." The weakening of the concept of finality of judgment through the adoption of liberal habeas rules has permitted appeals to routinely go on for 15 to 17 years. These developments, along with televising criminal trials, have exposed our entire population to apparent dilemmas, absurdities and inconsistencies within our system.

What can possibly justify appeals taking 15 or 17 years? How can the system explain a not guilty verdict when the whole nation has seen a video recording conclusive as to guilt? How can a defense lawyer argue for acquittal when the DNA evidence is conclusive? We see these questions and many others raised by "experts" almost daily in the nation's newspapers and on televised news programs. Traditional answers to these questions are tiring, complex and unsatisfactory. The plain fact is that science and technology have advanced faster than our legal procedures. Thus, it is quite true that within the criminal justice system examples of apparent absurdities, inconsistencies and inexplicable dilemmas abound. Our legislatures and courts will respond to these issues, and eventually the system will be brought back into balance. Hopefully, our responses to these problems will be deliberate and measured and protective of those things that are good in our system. Many of our system's inconsistencies have always existed and over the course of history have been a source of great pride to many citizens. Indeed, the presumption of innocence, the issue

involved in this appeal, can be viewed as an absurdity in the face of overwhelming guilt. But who among us, in an eighth or ninth grade civics class, has not felt pride in our justice system when it was compared to foreign systems where a defendant may not be entitled to such a presumption.

While our legal system may have many problems, there is one solid, immutable principle which must be preserved and protected, and that is due process. No matter how guilty a person may be, he or she is entitled to due process. To suggest otherwise is to sanction mob justice and tyranny. We do no honor to our system by winking at serious trial error. If a defendant is guilty, he or she should be convicted in every case by the state in a trial that is free of serious error.

Judge Lumpkin in his dissent sets forth the applicable Oklahoma harmless error statute[2] but declines to follow it, preferring instead the Federal Courts' more liberal harmless error doctrine. Judge Lumpkin complains that this Court has somehow defaulted in its duty to develop a "standard" which can be applied to these cases. We should, and do, decline his invitation. The statute is clear and there is no need for this Court to confuse the issue by judicially legislating an amendment to it. The harmless error standard applicable to statutory errors is whether or not the error "constitutes a substantial violation of a ... statutory right."[3] We cannot improve upon the language by trying to define the word "substantial," and to try would be as useless as trying to define the phrase "reasonable doubt." A majority of this Court finds the error in this case to be a substantial violation of a statutory right. It is not, therefore, harmless.

Clearly, Oklahoma statutes require a trial judge in a

[2]20 O.S.1991, § 3001.1.

[3]Id.

state criminal case to instruct the jury that the defendant is "presumed innocent" of all crimes charged.[4] This Court unanimously agrees that the trial judge in this case erred when he instructed the jury that *Flores* was presumed to be "not guilty" of the first degree murder charge filed against him. We are, however, currently divided over whether the *Flores* holding must be applied to other appellants who have raised this issue on direct appeal.[5] A majority of this Court is convinced that Flores must be applied to all other such cases.[6]

[4]See 22 O.S.1991, § 836 (Defendant presumed innocent--Reasonable doubt of guilt requires acquittal); 12 O.S.1991, § 577.2 ("Whenever Oklahoma Uniform Jury Instructions (OUJI) contains an instruction applicable in a ... criminal case, ... and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law."). See also OUJI-CR 110 ("Presumption of Innocence").

[5] [5]In his dissent to this order, Judge Lumpkin's analysis of the issue presented, while unquestionably sincere, is flawed by his perception that the error in these cases can be deemed harmless if there are not other errors and there is overwhelming proof of guilt. The issue presented to us is not whether or not the defendant is guilty. Rather, the issue is whether or not the
defendant received a fair trial in accordance with Oklahoma statutes. It is not the business of this Court to sit as a super-jury. It is our business to see that the trial courts follow the law. And, if they do not follow the law, it is our sworn duty to reverse them however difficult or unpopular it may be to do
so.

[6]This Court is not unmindful of the difficulties our decision will bring to the District Court of Tulsa County. We are well aware a large number of cases will have to be retried because of this error. While we are sympathetic to these very real problems, we cannot ignore the clear

The United States Supreme Court has recognized that a presumption of innocence instruction serves two purposes: (i) it "remind[s] the jury that the prosecutor has the burden of proof beyond a reasonable doubt, ... [and (ii) it] ... 'cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.'"[7] The presumption of innocence instruction thus reiterates and helps the jury understand an accused's constitutional rights to (i) be proven guilty beyond a reasonable doubt, and (ii) be judged solely on the basis of evidence presented during trial.[8] When administered, the presumption of innocence instruction shapes the jury's understanding of a criminal defendant's constitutional rights, and thus affects how the jury performs its duty to render a

dictates of the law to reach an expedient result. We are not ordering dismissal of these cases. These cases will be reversed and remanded for new trials. In addition, we are, hopefully, sending a message to the trial judge and the prosecution. Our message to the trial judge is very simple: follow the law. Our message to the prosecution is that it should join with the defense in objecting to a clearly erroneous instruction. With both sides objecting, it is much less likely a trial judge will insist on giving an erroneous instruction.

[7]*Kentucky v. Whorton*, 441 U.S. 786, 790-91, 99 S. Ct. 2088, 2090, 60 L. Ed. 2d 640 (1979), *quoting* 9 J. Wigmore, Evidence § 2511, p. 407 (3d ed. 1940) (Stewart, J., dissenting). See also *Taylor v. Kentucky*, 436 U.S. 478, 484-86, 98 S.Ct. 1930, 1934-35, 56 L. Ed. 2d 468 (1978) (recognizing that a "presumption of innocence" instruction significantly aids the jury in understanding the prosecutor's burden to prove guilt beyond a reasonable doubt, and also provides one means of explaining to the jury the accused's constitutional right to be judged solely upon the evidence adduced at trial).

[8]*See Taylor v. Kentucky*, 436 U.S. at 484-86, 98 S.Ct. at 1934-35.

verdict in accordance with those rights.

Despite its role as protector of constitutional rights, however, a presumption of innocence instruction is not mandated by the United States Constitution.[9] The United States Supreme court has concluded that juries are capable of applying the constitutionally requisite "beyond a reasonable doubt" standard and considering only the trial evidence, even if they are not specifically instructed that a defendant is presumed innocent. If the trial record reflects that a criminal defendant was otherwise afforded his or her rights (i) to be proven guilty beyond a reasonable doubt and (ii) to be judged solely by evidence adduced at trial, the trial may be considered fair under the United States Constitution even if a presumption of innocence instruction was not administered.

The case at issue, however, involves much more than a trial judge's simple omission of the presumption of innocence instruction--an error which violates Oklahoma statutes but not the United States Constitution. Here, the trial judge administered an instruction on the presumption of not guilty--an error which violates both the letter and spirit of Oklahoma statutes as well as the United States Constitution. Just as a presumption of innocence instruction would have shaped and influenced both the jury's understanding of Flores's constitutional rights and its role in honoring those rights, so did the instruction on the presumption of not guilty. Unfortunately, the presumption of not guilty instruction did not serve to improve the jury's understanding of Flores's constitutional rights. Instead, the presumption of not guilty instruction effectively diluted Flores's constitutional rights to be proven guilty beyond a reasonable doubt and only by the evidence developed at trial, possibly causing the jury to take less seriously its duty to abide by

[9]*Kentucky v. Whorton*, 441 U.S. at 789, 99 S.Ct. at 2090.

them.

How could the jury in this case have remained unaffected by the trial judge's instruction that Flores was presumed not guilty rather than innocent? Most any person qualified to sit on a jury in this country is familiar with the phrase that a criminal defendant is "presumed innocent until proven guilty." If the trial judge had simply failed to tell the jurors to presume Flores was innocent, chances are they still would have considered it their obligation to do so. However, when the trial judge specifically and negatively altered the well-known phrase, the jurors may have questioned their own common sense understanding of it which they had each consciously or unconsciously brought into the courtroom.

To ask jurors to presume that a criminal defendant remains innocent until the State proves him or her guilty, both acknowledges their inclination to believe that one who has been arrested, charged and bound over for trial must have violated the law, and commands them to suppress that inclination. The trial judge's presumption of not guilty instruction demanded much less of Flores's jury. Rather than requiring that the jurors chase from their minds all images of Flores as shackled, blameworthy, culpable, the presumed not guilty instruction allowed the jurors to retain their biases and asked only that they hold the State to its legal burden to prove him guilty beyond a reasonable doubt.

The trial judge himself appreciates the radical difference between the phrases "presumed innocent" and "presumed not guilty," as evidenced by the following quote from another case in which he also chose to administer an instruction containing the latter, incorrect terminology:

> Again as I have stated many, many times I do not give an instruction that is in the OUJI; to give a reason for not doing so, I believe that in the OUJI instruction, they state that the defendant is presumed to be innocent. There

> is a difference between being innocent and not guilty. A person can be found not guilty and still not be innocent of the crime charged.[10]

Judge Hopper's words support the majority's conclusion that the phrase "presumed not guilty" is not reasonably synonymous with the phrase "presumed innocent."[11] Those words also provide an example of the danger in allowing individuals in positions of power to follow their own personal beliefs rather than the law.

Ours is "a government of laws and not of men."[12] This historic phrase, which expresses the aim of those who framed our Declaration of Independence and founded the Republic, "was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power."[13] Under a government of laws and not of men, "power must be exercised according to law; and government, including the courts, as well as the governed, must move within its

[10]*Smith v. State*, (Tulsa County District Court, CF-93-4510) No. F-94-430, Tr. 212.

[11]Judge Hopper's words also clearly demonstrate that there is more to the two phrases than a "distinction without a difference" as Judge Lumpkin would have us believe.

[12]John Adams, "Novanglus Papers," no. 7. -- The Works of John Adams, ed. Charles Francis Adams, vol. 4, p. 106 (1851).

[13]*United States v. United Mine Workers of America*, 330 U.S. 258, 308-09, 67 S.Ct. 677, 703, 91 L.Ed. 884 (1947) (Frankfurter, J., concurring in the judgment).

limitations." [14] "[T]here is no arbitrary power located in any individual or body of individuals; but ... all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."[15]

The citizens of Oklahoma, speaking through the State legislature, have declared that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, ..."[16] An instruction on the presumption of innocence is included in the Oklahoma Uniform Jury Instructions (Criminal),[17] and must be administered to juries in criminal trials.[18] The Oklahoma citizenry has also declared that when a trial court determines that a jury should be instructed on a subject and an appropriate uniform instruction exists, the uniform instruction "**shall be used** unless the [trial] court determines that it does not accurately state the law."[19] Judge Hopper's conscious decision to

[14]Id. at 385, 67 S.Ct. at 741 (Rutledge, J., dissenting.).

[15]*Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 84, 22 S.Ct. 30, 32, 46 L.Ed. 92 (1901).

[16]22 O.S.1991, § 836.

[17]OUJI-CR 110.

[18]*Jenkins v. State*, 11 Okl.Cr. 168, 145 P. 500, 501 (1914).

[19]12 O.S.1991, § 577.2 (emphasis added). It should be noted that Judge Hopper does not defend his decision to administer a "presumption of not guilty" instruction rather than a "presumption of innocent" instruction on the grounds that the latter does not accurately state the law. Rather, he seems to harbor the personal belief that "presumed not guilty" better describes the manner in which a jury should view a criminal defendant awaiting trial.

supplant the laws of this State with his own brand of justice constitutes government by whim, "the very antithesis of due process."[20]

"[E]ven if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests--the people."[21]

If the citizens of this State wish to alter our statutory requirement that juries in criminal trials be instructed that defendants are presumed innocent until proven guilty, they are free to pursue their goals at the State legislative level. In the meantime, trial judges are bound by the rules which the people have enacted.

Dismissing as "harmless" the instructional error committed in this case would undermine two crucial tenets of our democratic society: that a criminal conviction must be supported by trial evidence which establishes guilt beyond a reasonable doubt; and, that our government is one of laws and not of men. I am unwilling to cast my vote in support of a diluted Constitution whose principles wax or wane at the pleasure of the individual who at a given time may be entrusted with their enforcement. I therefore support the majority's decision to reverse Flores's conviction, and concur in its denial of the State's Petition for Rehearing.

[20]*McGautha v. California*, 402 U.S. 183, 250, 91 S.Ct. 1454, 1488, 28 L. Ed. 2d 711 (1971) (Brennan, J., dissenting), vacated on other grounds, 408 U.S. 941, 92 S.Ct. 3873, 33 L. Ed. 2d 765 (1972).

[21]*American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 553, 69 S. Ct. 258, 265, 93 L.Ed. 222 (1949) (Frankfurter, J., concurring).

Strubhar, J., Specially Concurring:

It is with some trepidation that I write to this Order denying rehearing since the opinion of January 24, 1995[1] clearly sets forth the views of this Court, the dissents' remarks notwithstanding. I am saddened by the dissents' attempted evisceration of a principle so fundamental to our system. It is disheartening that Judge Lumpkin chooses to term as a "folkway" a principle which serves as the foundation of our criminal justice system. To discount the presumption of innocence is to succumb to the current trend in our society to shirk and devalue principles for short-term and short-sighted results.

If the presumption of innocence is not sacred in our system then what is to become of us. This Court took this challenge very seriously when it rendered its decision in this matter. Knowing its decision could affect many convictions, otherwise valid and cause great pain for victim's families, this writer agonized over the decision to find such an error may never be harmless. Yet, in the name of preserving convictions in which the accused is overwhelmingly guilty, the dissent attempts to drain *Flores* of much of its vitality. The dissents' untenable conclusion, that the error can be harmless when the evidence of guilt is strong, arises from a specious denial of the role of the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.[2] Judge Lumpkin and Judge Johnson both agreed that the erroneous instruction in this

[1]*Flores v. State*, _____ P.2d _____, 66 OBJ 367 (1995).

[2]While acknowledging a distinction between omitting an instruction on the presumption of innocence and administering an incorrect instruction, Judge Lumpkin employs the erroneous analysis used when an instruction is omitted rather than considering the specific question presented.

case lessened the burden of proof. *See Flores v. State*, P.2d at _____, 66 OBJ at 371 (Lumpkin, J. concurring in result). However, they now somehow reason that such an error can be harmless if the evidence of guilt is overwhelming. This surely cannot be. If the instruction in this case lessens the burden of proof, an identical instruction in another case must also have the same effect regardless of the evidence of guilt. And when an instructional error consists of a misdescription of the burden of proof, it vitiates all of the jury's findings. *Sullivan v. Louisiana*, 508 U.S. _____, 113 S.Ct. 2078, 1082-83, 124 L. Ed. 2d 182, 190 (1993). This leaves a reviewing court to engage in pure speculation as to what a reasonable jury would have done. *Sullivan v. Louisiana*, 508 U.S. at _____, 113 S.Ct. at 2082, 124 L. Ed. 2d at 190. The Supreme Court has said such an error is structural and is not subject to harmless error review. *Id.*

The dissents' votes inthis case are wholly inconsistent with their harmless error analysis. The facts show overwhelmingly that Mr. Flores brutally and savagely strangled Sheila Ann Brown and prior to her death caused severe and violate injury to her anal opening. After this savage murder Mr. Flores ruthlessly bound and gagged Brown and tossed her body into a trash dumpster. Yet in the *Flores* opinion of January 24, 1995, Judges Lumpkin and Johnson found the presumed not guilty instruction necessitated reversal because the error was harmful. It is they who need to more fully explain their change in judicial integrity requires it. Truly, it is unfortunate that the dissent now finds the need to retreat from the original *Flores* decision in the wake of several reversals based on the plain error found in this case. Each member of this Court has sworn an oath to uphold the law and apply it without regard to public opinion, retention elections and the number of cases affected.

In our system the presumption of innocence gives concrete protection to the accused and forbids the State from imposing punishment unless it can demonstrate beyond a reasonable doubt at a public trial with the attendant constitutional safeguards that a particular individual has engaged in proscribed criminal conduct. "Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), and is established beyond legislative contravention in the Due Process Clause. See *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692-1693, 48 L. Ed. 2d 126 (1976); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-1073, 25 L. Ed. 2d 368 (1970). *See* also *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S.Ct. 1930, 1933-1934, 56 L. Ed. 2d 468 (1978); *Kentucky v. Whorton*, 441 U.S. 786, 790, 99 S.Ct. 2088, 2090, 60 L. Ed. 2d 640 (1979) (Stewart, J., dissenting)." *U.S. v. Salerno*, 481 U.S. 739, 763, 107 S.Ct. 2095, 2110, 95 L. Ed. 2d 697 (1987) (Marshall, J., and Brennan, J., dissenting).

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz*, 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting). Honoring the presumption of innocence can be difficult and sometimes we as citizens of a free society must pay substantial social costs as a result of our commitment to the values we espouse. But in the end the presumption of innocence protects the innocent. The shortcuts we take with those whom we believe to be guilty can only harm those wrongfully accused and, ultimately, ourselves.

It has always been my belief that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional and statutory safeguards securing in our free society the legitimate expectations of every person to innate human dignity and a fair trial. It is a regrettable abdication of that role and a saddening denigration of our system when members of this Court would condone arbitrary and capricious judicial conduct branding an individual as a criminal without compliance with constitutional and statutory procedures which ensure the fair and impartial ascertainment of criminal culpability. The dissents' position must surely be a short-lived aberration.

Throughout the world today there are men, women, and children imprisoned indefinitely, awaiting trials which may never come or which may be nothing more than a mockery because their governments believe them to be "dangerous." Our Constitution and its attendant principle of the presumption of innocence, whose construction began long ago, can shelter us forever from the evils of such unchecked power. Over our history our principles have slowly, through our efforts, grown more durable, more expansive, and more just. Yet, principles alone cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today, the dissent applies itself to an ominous exercise in demolition. Theirs is truly a position which will go forth without authority, and come back without respect. The trial court's erroneous instruction altering the presumption of innocence to a presumption of not guilty amounts to plain error. As Mark Twain once said, "[t]he difference between the almost right word is really a large matter--'tis the difference between the lightning bug and the lightning."[3] Honoring the oath I swore upon taking this office, I concur

[3]The Art of Authorship

in this Order denying the State's Petition for Rehearing.

JOHNSON, PRESIDING JUDGE: DISSENT

I also dissent to the Court's decision to deny the Petition forRehearing in the above-styled cause. At the outset, I must apologize to my colleagues relative to my concurrence in the original case herein. *Flores v. State*, _____ P.2d _____, 66 OBJ 367 (1995). My apology is based upon my reading of the case. I did concur with the decision as it related to Jose Flores only. After many discussions by the Judges on this Court, I find that I was in error in interpreting the wording in the opinion. I was wrong in my interpretation of "whether the error is harmless error beyond a reasonable doubt or goes to the foundation of the case constituting a substantial violation of a constitutional or statutory right." *Flores v. State*, (slip opinion at page 4). My initial reading of the opinion and my reason for the concurrence was my position that although there was error, which is clear and unambiguous, I would have applied a harmless error test but in *Flores*, I did not find harmless error and, therefore, voted to concur. Now I find that the majority would reverse all *Flores* type cases due to the fact that it is a substantial violation of a statutory right and the harmless error doctrine would not apply. Therefore, I dissent.

I will not write a long dissenting opinion due to the fact I generally concur in the dissent written by Judge Lumpkin and find it to be an excellent historical analysis of not only the function of an appellate court but also an excellent analysis of the "harmless error doctrine". I specifically agree with Judge Lumpkin that the United States Supreme Court has not made a finding that the presumption of innocence instruction is of constitutional magnitude nor a constitutional requirement. *Kentucky v. Whorton*, 441 U.S.

786, 99 S.Ct. 2088, 60 L. Ed. 2d 640 (1979).

I also agree with Judge Chapel's specially concurring opinion wherein he makes reference to all of the Court being unanimous in its position that there is error in the original Flores case when the judge instructed on "not guilty" rather than "presumed innocent". I further agree with Judge Chapel that this will cause a great deal of difficulty and many additional trials in the District Court of Tulsa County. I agree with Judge Chapel that this Court has not created the error, this Court has not created the problem, the problem was created by a District Judge who did not follow the law and use the OUJI instructions as required to do.

I again would use the harmless error doctrine in all of these cases and would look at each case to see whether or not the cases could be affirmed by using such doctrine. Lawyers understand the great legal difference between the terms "presumed innocent" and "not guilty". While I feel this from a legal standpoint, I am not sure that jurors understand the significant difference between the two terms. Many layman would even consider this to be a legal technicality. Based upon this assumption, I would find that the harmless error doctrine could be applied to all of these cases and that the error does not constitute a substantial violation of a statutory right. Therefore, it is not so fundamental as it would require reversal of all of these cases. 20 O.S.1991, § 3001.1.

LUMPKIN, JUDGE: DISSENTING

I must strongly dissent to the Court's decision to deny the Petition for Rehearing in this case. Without qualification, I have the greatest respect for the professional knowledge, experience and abilities of my colleagues on this Court. However, it now appears the plain language of the opinion

is not being applied regarding the application of a harmless error analysis. The Court has now determined, in effect, the failure to give a presumption of innocence instruction is not subject to an application of harmless error because it violates a substantial statutory right. This decision is made without legal analysis or setting forth the criteria for determining when a statutory violation is "substantial". Because that decision fails to apply the rule of law regarding the application of harmless error to cases pending beforethis Court, I urge the Court to withdraw its original opinion so that it may beredrafted to state what is the true decision of the Court in this matter.[1]

Before I examine the *Flores* case itself and the issues presented by it, I feel compelled to review the principles which comprise both the law and the basis for this dissent. I begin with the law as dictated by the Legislature to this and every other appellate court in the state. It reads:

> No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing Court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

20 O.S.1991, § 3001.1. The legislative dictate has not only

[1]The number of separate writings to a very general Order Denying Petition for Rehearing, coupled with the extremes of broad labeling, in an effort to provide a different interpretation to the plain words in the original opinion, conclusively proves the need to reissue the opinion.

been in effect since statehood because the Legislature does not like to see convictions reversed without a valid basis; but, it also reflects a deliberate and principled philosophy that, so long as a defendant in a criminal trial receives a fair trial, he is not entitled to reversal on an error which could not possibly have affected the outcome of his trial. Or, as the United States Supreme Court phrased it:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States v. Nobles*, 422 U.S. 225, 230 [95 S.Ct. 2160,2166, 45 L. Ed. 2d 141] (1975), and promotes public respect for the criminal processby focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ('Reversal for error, regardless of its effecton the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it').
>
> . . . .
>
> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in

> fairness has been satisfied and the judgment should be affirmed.

Rose v. Clark, 478 U.S. 570, 577, 578-79, 106 S.Ct. 3101, 92 L. Ed. 2d 460 (1986) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986)).

To a large extent, a harmless error provision such as we have forces the courts to recognize the authority granted to a republic comes only through the consent of the people to be governed. That consent is given based upon respect for the system and faith in its appropriate and pragmatic application. That respect is earned based upon rational and reasonable applications of the rule of law.

Alexander Hamilton discussed the role of the judiciary department in the proposed republic in The Federalist No. 78. This is the writing most often quoted for the statement "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. However, Hamilton also addressed the role of the Courts in the interpretation of legislative enactments when he wrote:

> It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of **JUDGMENT**, the consequence would equally be the substitution of their pleasure to that of the legislative

> body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body. (emphasis added)

It is especially incumbent upon appellate courts to maintain the appropriate perspective of the Court's role in the application of constitutional legislative enactments. The concept of "a government of laws and not of men" must be applied equally to appellate courts and trial courts. Personal distaste for the action of a single individual in the course of a trial should not cause the bending of a rule of law.

Because the (apparent) holding of this Court, that reversal is necessitated in all instances by these improper instructions, not only does not follow the law, but also is fraught with the potential for ridiculous and abusive results, I must dissent.

As the Court recognized in *Flores v. State*, _____ P.2d _____, 66 OBJ 367 at 368 (Okl.Cr.1995), "the presumption of innocence until proven guilty is a right guaranteed by statute," citing to *Miller v. State*, 3 Okl.Cr. 374, 106 P. 538 (1910); 22 O.S.1991, § 836.[2] The Court then recognized a presumption-of-innocence instruction is not required by either the United States Constitution or the Oklahoma Constitution.

The Court has accurately recognized that regardless of the assumed mandate for the requirement of an instruction

[2]It does not matter how much one attempts to wrap a statute in the flag and Constitution, it is still only a statutory right subject to the rules applicable to harmless error review. We are bound by our oaths and role as appellate judges to interpret it as it is, and not how we wish it were. This is consistent with my original vote to the Flores opinion where I sought to provide the objective criteria for the application of harmless error analysis which had been omitted from the Court's opinion.

on the presumption-of-innocence, the guarantee is not provided through a constitutional right but by statutory enactment in the state of Oklahoma. This fact does not take away the aura of the legal concept; it only places the concept in its appropriate perspective for purposes of appellate review of error which may arise by failure to instruct on the statutory presumption. The historical analysis of the concept is set out in *Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895), where the United States Supreme Court recognized the presumption is not an articulated right under the Federal Constitution. Rather, it is inferred from the maxim from Roman law that "it was better to let the crime of a guilty person go unpunished than to condemn the innocent." *Id.* 39 L.Ed. at 491.

It is from this maxim that the Court in *Coffin* inferred the quote attributed to it in *Flores* that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Therefore, it is readily apparent the principle is not based upon a strict constitutional right, but is inferred from the folkways or mores[3] which have developed over time in our application of law.

Acknowledging its genesis does not detract from its importance as a concept within our legal system; it only points out we must view it only through the specific

[3]Websters Third New International Dictionary (unabridged) defines "folkway" as "a mode of thinking, feeling, or acting common to a social group"; and "mores" as 'the fixed customs or folkways of a particular group that are morally binding upon all members of the group and necessary to its welfare and presentation". In other words, the unarticulated moral fabric which secures the future for a civilized society.

articulation of the Oklahoma Legislature.

A more contemporary analysis of the *Coffin* decision is set out in *Culpepper v. State*, 4 Okla. Crim. 103, 111 P. 679 (1910), where the Oklahoma Court of Criminal Appeals analyzed the issue relating to an incorrect resumption-of-innocence jury instruction. The Court focused on what has since become an enunciation of a constitutional requirement, i.e., that a jury must be correctly instructed regarding the burden of proof beyond a reasonable doubt. In applying the burden of proof analysis, the Court stated "we decline to follow the cases of *Horn v. Territory*, 8 Okl. 52, 56 P. 846, and *Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L.Ed. 481, in this respect, and we hold that there was no error in the instruction given." *Id.* at 686. History has proven this view correct. *See Sullivan v. Louisiana*, 508 U.S. _____, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993).

Therefore, the failure to give a presumption-of-innocence instruction or giving an incorrect presumption-of-innocence instruction is still subject to harmless error analysis.

This view is strengthened by Justice White, who in his dissent to Part III of the majority holding in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L. Ed. 2d 302, 319 (1991), wrote:

> [W]e have held susceptible to harmless-error analysis the failure to instruct the jury on the presumption of innocence, *Kentucky v. Whorton*, (citation omitted) while finding it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable doubt standard, *Jackson v. Virginia*, (citations omitted). These cases cannot be reconciled by labeling the former 'trial error' and the latter not, for both

> concern the exact same stage in the trial proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial. A jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process, because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt. See *Whorton*, (citations omitted); *Taylor v. Kentucky*, (citations omitted). While it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable-doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt. In addition, omission of a reasonable doubt instruction, though a 'trial error,' distorts the very structure of the trial because it creates the risk that the jury will convict the defendant even if the state has not met its required burden of proof.

Id. 499 U.S. at 291.[4]

[4]My further discussion of the reasonable doubt instruction, later examined by the Court in Sullivan v. Louisiana, 508 U.S. _____, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993) follow. infra. In that case, the Court found an incorrect instruction defining beyond a reasonable doubt cannot be subject to harmless error analysis.

Therefore, even the dissenters in *Arizona v. Fulminante* acknowledged harmless error analysis was applicable to the failure to give a presumption-of-innocence instruction. This is "because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt."

Further proof can be found in *Kentucky v. Whorton*, where the Court stated:

> While this Court in *Taylor* reversed a conviction resulting from a trial in which the judge had refused to give a requested instruction on the presumption of innocence, the Court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case. Rather, the Court's opinion focused on the failure to give the instruction as it related to the overall fairness of the trial considered in its entirety. (emphasis added)
>
> The Court observed, for example, that the trial judge's instructions were 'Spartan' (citations omitted), that the prosecutor improperly referred to the indictment and otherwise made remarks of dubious propriety, (citation omitted), and that the evidence against the defendant was weak. (citation omitted). '[T]he combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those

> extraneous considerations, rather than on the evidence introduced at trial.' (citations omitted)
>
> It was under these circumstances that the Court held that the failure of the trial court to instruct the jury on the presumption of innocence denied the defendant due process of law. Indeed, the Court's holding was expressly limited to the facts: 'We hold that on the facts of this case the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.' (citations omitted) (emphasis added). This explicitly limited holding, and the Court's detailed discussion of the circumstances of the defendant's trial, belie any intention to create a rule that an instruction on the presumption of innocence is constitutionally required in every case. 441 U.S. 788-789, 60 L. Ed. 2d at 643.

Thereafter, the Court set out the guidelines to be used in applying harmless error to the failure to give a presumption of innocence instruction.

This is contrasted with a more recent decision dealing with the failure to give a correct instruction defining "beyond a reasonable doubt." In *Sullivan v. Louisiana*, 508 U.S. _____, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993), the Court determined the failure to give a correct "beyond a reasonable doubt" instruction allows an appellate court, rather than the jury, to reach the requisite finding of guilt. The failure to give a correct instruction in that case required reversal because there had not been a determination by the

jury of the guilt; therefore "there is no object, so to speak, upon which harmless error scrutiny can operate."[5] 124 L. Ed. 2d at 190. The opinion then states:

> Insofar as the possibility of harmless-error review is concerned, the jury-instruction error in this case is quite different from the jury-instruction error of erecting a presumption regarding an element of the offense. A mandatory presumption - for example, the presumption that a person intends the ordinary consequences of his voluntary acts - violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. (citations omitted). But, '[w]hen a

[5]It is here the analysis must focus on the difference between the object, or goal, of a trial -- here, the finding of guilt beyond a reasonable doubt -- and the starting point from which that trial begins -- here, whether a defendant is "presumed innocent" or "presumed not guilty." The gist of the Sullivan opinion is that, by giving an incorrect instruction on what "reasonable doubt" is, the jury did not know where the "goal" was; and when a reviewing court declares where the goal should have been, it takes from the jury the very constitutional guarantee provided by the constitution: to let the jury decide whether the prosecution reached its "goal" of beyond a reasonable doubt. This is not what occurred here. Here, the Court incorrectly told the jury where the starting place was. This is an error that can be corrected by a reviewing court: so long as the jury knew where the "goal" was, the constitutional guarantee of being found guilty beyond a reasonable doubt has been preserved; and a reviewing court can review the evidence presented using the appropriate starting point to determine whether enough evidence was present to reach the goal. While not identical to it, this is substantially equivalent to conducting a review of the sufficiency of the evidence, something this Court does virtually every day. Therefore, Sullivan firmly supports the application of harmless error review and application in cases in which the presumed not guilty instruction was given.

> jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt.' (citations omitted) And when the latter facts 'are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed.' (citations omitted). A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt. *Yates* (citation omitted). But the essential connection to a 'beyond-a-reasonable-doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. (emphasis added) A reviewing court can only engage in pure speculation - its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.' (citations omitted).

Chief Justice Rehnquist wrote a concurring opinion and added the analysis, based on *Arizona v. Fulminante*, and further stated:

> there is a 'strong presumption' that any error will fall into the first of these categories. *Rose v. Clark* (citations omitted). Thus, it is the rare case in which a constitutional violation will not be subject to harmless-error analysis. See *Fulminante* (citations omitted).

The strong presumption that any error will fall into the first

of these categories refers to the category of "trial errors", which the Court, in *Arizona v. Fulminante* said "may . . . be quantitatively assessed in the context of other evidence presented," and are amenable to harmless-error analysis. This Court regularly applies federal caselaw in determining the scope, method and application of harmless error analysis. While the provisions of 20 O.S.1991, § 3001.1 express the legislative intent for courts to apply a harmless error analysis, it does not obviate the methodology we have adopted from the federal courts in conducting that analysis.

This Court has repeatedly held a defendant is entitled to a fair trial, not a perfect one. See *Plotner v. State*, 762 P.2d 936, 946 (Okl.Cr.1988); *Lahey v. State*, 742 P.2d 581, 585 (Okl.Cr. 1987); *Jones v. State*, 610 P.2d 818, 820 (Okl.Cr.1980); and *De Wolf v. State*, 96 Okla.Crim. 382, 391, 256 P.2d 191, 200-01 (1953). We must be ever vigilant to ensure the fairness of all proceedings wherein a person is prosecuted for the violation of penal provisions of our law. The factors which have been enunciated for the application of harmless error to errors which do occur during the course of a trial are founded upon the principle of fairness. The United States Supreme Court not only recognized this principle in *Kentucky v. Whorton* but also applied it in formulating the criteria to utilize in determining whether the error is harmless. I submit this Court should also review the error in this case "in light of the totality of the circumstances -- including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevent factors -- to determine whether the defendant received a constitutionally fair trial." Id. 441 U.S. at 789.

The Petition for Rehearing correctly points out Instruction No. 3 in this case was a correct instruction on the burden of proof. This is a fact which was apparently overlooked by each of the members of the Court during the

initial review of the case. As the original opinion stated

> The presumption of innocence commands the jury to start their deliberations from the premise there exists an absence of guilt while the presumption of not guilty conveys there exists an absence of sufficient proof of guilt. While the distinction is subtle, we find it amounts to an impermissible lessening of the burden of proof by expanding the degree of doubt that is permissible. Such error was not cured by any other instructions specifically, an appropriateburden of proof instruction. (emphasis added) 66 OBJ at 369

The problem has now been correctly brought to the attention of the Court that in *Flores*, the jury was properly instructed as to the burden of proof (beyond a reasonable doubt) the State must meet for a defendant to be found guilty of the crime of Murder in the First Degree. The Court's original opinion failed to distinguish the general instructions contained in Instruction 1 and 2 with the specific elements of the crime instruction contained in Instruction No. 3. Those instructions read as follows:

INSTRUCTION NO. 1

You are instructed that the burden of proof in this case is upon the State to establish by evidence, beyond a reasonable doubt, all the material allegations contained in the Information and unless the State has met it's duty in this respect, you cannot find the defendant guilty, but must acquit him.

INSTRUCTION NO. 2

You are instructed that the defendant is presumed to be not guilty of the crime charged against him in the Information unless his guilt is established by evidence beyond a

reasonable doubt and that presumption of being not guilty continues with the defendant unless every material allegation of the Information is proven by evidence beyond a reasonable doubt.

INSTRUCTION NO. 3

You are instructed that no person may be convicted of Murder in the First Degree unless the State has proven beyond a reasonable doubt each element of the crime. These elements are:

1. The death of a human;
2. The death was unlawful;
3. The death was caused by the defendant;
4. The death was caused with malice aforethought.

I agree the use of the terms "material allegations contained in the Information" instead of the terms "each element of the crime" in Instructions 1 and 2 is error. A juror cannot determine what is legally material or not and if what he or she deems material is an element of the crime that must be proven beyond a reasonable doubt. However, Instruction No. 3 provided the correct burden of proof instruction for the crime in this case as required by OUJI-CR 427. The specific instruction controls over the general instructions.

The only instructional error which was not corrected had to do with giving the "presumed not guilty" versus the "presumed innocent" instruction.[6] While I continue to agree

[6]The "material allegations" instruction is indeed error, but an appellate court can easily determine whether this instruction was harmless. If the jury had a question as to which allegations in the information were "material" and which were not; but the prosecution proved all allegations in the information, whether "material" or not, there can be no question such an error must be harmless, as any error (requiring the proof of additional allegations) enured to the benefit of the defendant. However, as noted, this instructional error was corrected in

that the concept of "presumed innocent" is an inherent part of the fabric of our jurisprudence, in all honesty, the concept from the standpoint of burden of proof and impacting the trial is no more than a gnat's hair difference to the average juror.[7] Therefore, under the Supreme Court decisions I have been able to review, it is almost a distinction without a difference as it applies to the ability of this Court, or any Court, to conduct a harmless error analysis. Based on the weight of the caselaw on this issue, I have been unable to discern a legal basis for the position that harmless error analysis cannot be applied to failure to give an instruction on presumption-of-innocence, or even the incorrect instruction of presumed not guilty.[8]

Instruction No. 3.

[7]For example, Black's a Law Dictionary (6th Ed.1990) defines "innocent" as "Free from guilt; acting in good faith and without knowledge of incriminatory circumstances, or of defects or objections. See Not Guilty." The dictionary defines "Not Guilty" as ". . . . Also, the form of verdict in criminal cases where the jury acquits the defendant; i.e., finds him "not guilty."

[8]Cf., e.g., *Pope v. Illinois*, 481 U.S. 497, 503 n. 7, 107 S.Ct. 1918, 95 L. Ed. 2d 439 (1987) (unconstitutional instruction concerning obscenity) ("By leaving open the possibility that petitioners' convictions can be preserved despite the instructional error, we do no more than we did in *Rose [v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L. Ed. 2d 460 (1986)]. To the extent that cases prior to Rose may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, . . . after *Rose*, they are no longer good authority"); *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L. Ed. 2d 460 (1986) (instruction on unconstitutional presumption dealing with intent subject to harmless error analysis); *Connecticut v. Johnson*, 460 U.S. 73, 93-94, 103 S.Ct. 969, 74 L. Ed. 2d 823 (1993) (plurality) ("We agree with the

In summary, then, the failure to give a presumption of innocence instruction, or even an incorrect statement of "presumed not guilty," does not preclude a harmless error analysis if, as in this case, a correct instruction regarding the burden of proof of each element of the crime beyond a reasonable doubt was given. The instructional error of an incorrect instruction of presumed not guilty is no different from any other instructional or evidentiary error which may be committed at trial. Each error is a "trial error" which is subject to harmless error analysis. There is a "strong presumption" the error is subject to harmless error analysis. Appellant Flores presented nothing in his brief showing why this presumption should not be honored here. Since that is -- or should be -- the starting point for this analysis, the presumption, combined with the analysis made herein, convinces me a harmless error analysis should be conducted.

In making this analysis, we in no way denigrate the significance of the concept of presumption-of-innocence within our jurisprudence. We merely ensure it is not elevated beyond that position which it actually occupies within the

State that, in light of Chapman, these cases cannot be read for the broad proposition that instructional error of constitutional dimensions may never be harmless. This is not to say, however, that any form of instructional error should be analyzed for harmlessness. The question here is whether a charge that sight reasonably have been interpreted to require a conclusive presumption on the issue of intent may be considered harmless."); *Hopper v. Evans*, 456 U.S. 605, 613-614, 102 S.Ct. 2049, 2054, 72 L. Ed. 2d 367 (1992) (citing *Chapman* and finding no prejudice from trial court's failure to give lesser included offense instruction); *Hamling v. United States*, 418 U.S. 87, 107-08, 94 S.Ct. 2887, 41 L. Ed. 2d 590 (1974) (obscenity prosecution; in dealing with intervening law change between conviction and appellate decision, Court held reversal required only where there is a probability that instructions, now incorrect, "would have materially affected the deliberations of the jury. ")

jurisprudential framework. In this particular case, the presumed not guilty instruction violated the dictates of a state statute. That error, when coupled with the prosecutorial misconduct in closing argument, dictates a reversal and remand for new trial in this case. However, in a case which does not have other error and where the factors enunciated in *Kentucky v. Whorton* can be applied to determine if the error was harmless, this Court should apply the rule of law and exercise only its appropriate scope of appellate review.

As I read *Flores*, it unequivocally states (1) failure to give a presumption-of-innocence instruction and the giving of the presumed not guilty instruction is not a constitutional error, (2) the violation is one of state statute and not of state or federal constitutional magnitude, and (3) that the error is subject to harmless error analysis.[9] If the majority of this Court is now going to hold the giving of a presumed not guilty instruction is not subject to harmless error analysis

[9]See *Flores*, _____ P.2d _____ at _____, 66 OBJ at 368, where this Court said:

> Because OUJI-CR-903 correctly sets forth the presumption of innocence and 12 O.S.1991, § 577.2 requires trial courts to administer the uniform instructions, we find it was error to deviate from OUJI-CR-903. We must now determine whether the error is harmless beyond a reasonable doubt or goes to the foundation of the case constituting a substantial violation of a constitutional or statutory right. [citations]. This would seem to indicate a harmless error analysis is to be applied. see also Id. ("The actual impact of the instruction in the instant case on the judgment of the jurors is difficult to determine."); Id. at _____, 66 OBJ at 370 (Lumpkin, P.J., concurring in result) (discussing whether harmless error standard in the case should be "harmless beyond a reasonable doubt" or whether the reviewing court has "grave doubts" the error did not have a "substantial influence" on the trial).

due to the determination it violates a substantial statutory right under 20 O.S.1991, § 3001.1, I submit the appropriate action to take is to withdraw the original *Flores* opinion and rewrite it to state that position clearly. Merely to utilize the rubric of "it violates a substantial statutory right" without defining the legal criteria to be applied in determining when the violation of a state statute is "substantial" or not disregards our role and responsibility as an appellate court. In effect, the Court determines it will ascribe to the view Justice Stewart set out in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring) where, after stating he viewed the United States Supreme Court decisions in *Roth* and *Alberts*, which sought to define obsenity, as being constitutionally limited to hard-core pornography, said "I shall not today attempt further to define the kinds of material I understand to be embraced with that shorthand description [obsenity]; and perhaps I could never succeed in intelligibly doing so. **But I know it when I see it, and the motion picture involved in this case is not that.**" (emphasis added) Today this Court seems to adopt the "I know it when I see it" methodology in determining what is a "substantial violation of a ....statutory right." We should not utilize this type of jurisprudence to address such an important fiber in the fabric of Oklahoma statutory law. Without perimeters of legal construction being established to guide practitioners and future members of this Court it leaves the issue to forever waive in the wind like Oklahoma wheat prior to harvest. We do not fulfill our responsibility as the court with "exclusive appellate jurisdiction in criminal cases" for the State of Oklahoma when we do not provide the analysis required to create a body of law to which stare decisis can be applied in the future. It is impossible for future judges to know what we saw if we do not tell them.

We are doing a disservice to the practitioners and

members of the judiciary of this state if we do not withdraw the opinion and allow the majority to state, with supporting authority, that the error is not subject to harmless error analysis to ensure the bench, bar and public fully understand the nature and basis of the Court's decision.